



FILED

Apr 16 2008, 11:02 am

Kevin L. Smith

CLERK

of the supreme court,
court of appeals and
tax court

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DOUGLAS WRIGHT,)
)
Appellant-Defendant,)
)
vs.) No. 48A02-0711-CR-990
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

April 16, 2008

KIRSCH, Judge

Douglas Wright appeals the trial court's order revoking his probation, arguing that the trial court abused its discretion in finding that he violated the conditions of his probation by committing theft.

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 29, 2002, Wright pled guilty to operating a vehicle with a blood alcohol content of over .15¹ as a Class A misdemeanor, operating a vehicle while intoxicated endangering a person² as a Class A misdemeanor, and operating a vehicle after lifetime suspension³ as a Class C felony. The trial court accepted the plea and sentenced Wright to an aggregate term of eight years, with four years executed and four years suspended to probation.

Following his release from prison, Wright was on probation with the Madison County Probation Department. On July 13, 2007, the State filed a notice of probation violation alleging that Wright: (1) committed theft, as a Class D felony; (2) failed to provide written verification of successful completion of required substance abuse treatment; (3) failed to pay probation fees; and (4) failed to report to the probation department within forty-eight hours of his theft arrest. *Appellant's App.* at 18. At the start of the evidentiary hearing, Wright admitted that he failed to pay the probation fees. *Tr.* at 3. Following the hearing, the trial court found by a preponderance of the evidence that Wright had committed theft. The trial

¹ See IC 9-30-5-1(B).

² See IC 9-30-5-2(A).

³ See IC 9-30-10-17.

court revoked two years of Wright's probation and ordered him to serve that time on work release. Wright now appeals.

DISCUSSION AND DECISION

Probation revocation proceedings are civil in nature, and the State must prove a violation of probation by a preponderance of the evidence. *Thornton v. State*, 792 N.E.2d 94, 96 (Ind. Ct. App. 2003); *see also* IC 35-38-2-3(e). We review the trial court's revocation of probation for an abuse of discretion. *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*. An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005). This court will uphold a probation revocation if there is substantial evidence to support a trial court's conclusion that a probationer violated any term of his probation. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999). This court will neither reweigh the evidence nor judge the credibility of the witnesses. *Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). Rather, we look to the evidence most favorable to the State. *Id.*

The trial court may revoke probation for the commission of a criminal offense during the probationary period if the State has properly established the offense by a preponderance of the evidence. *Wilburn v. State*, 671 N.E.2d 143, 147 (Ind. Ct. App. 1996), *trans. denied*. Wright contends that the trial court abused its discretion in revoking his probation because the State failed to show by a preponderance of the evidence that Wright committed a new criminal offense of theft while on probation.

“A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.” IC 35-43-4-2. During the revocation hearing, the trial court heard the following evidence regarding Wright’s theft charge. As part of Wright’s probation, he participated in a methadone maintenance program in Indianapolis. Because Wright lived in Muncie and did not have a ride to the program, he arranged to ride with Shane Swafford, another participant in the program. Wright agreed to pay Swafford gas money in the amount of ten dollars per ride. *Tr.* at 33.

On the return trip from the April 19, 2007 meeting, Swafford pulled into a gas station in Madison County and parked next to a gasoline pump. Wright left the car and entered the station. Testimony and videotape surveillance showed that Wright entered the gas station, used the restroom, and returned to the car without approaching the counter or paying for gas. While Wright was in the restroom, Swafford pumped about ten dollars worth of gasoline into the car. The two men then drove away without paying.

Officer Kurt Foust of the Madison County Sheriff’s Department received a dispatch regarding a State Trooper having stopped two male suspects for a “drive off theft of gasoline.” *Tr.* at 4. Officer Foust responded and learned from the Trooper that both men denied taking the gasoline without paying. *Id.* at 8. Later, Swafford, who had been the driver, told Officer Foust, “Wright was to pay for the gas.” *Id.* at 11. At the hearing, Wright testified that Swafford admitted to stealing the gas. *Id.* at 25.

Following the evidentiary hearing, the trial court made the following statement:

We're here to decide whether it's more likely or not that Mr. Wright participated in a scheme to steal gasoline from Rickers [gas station]. And, there's some telling parts of the testimony here that, in my judgment, make it clearly more likely than not. These two guys are stopped next to a pump. Mr. Wright lies adamantly, not just kind of evasive, but lies adamantly to the police . . . who are trying to investigate what's going on here. He's the only one who goes in, so if somebody was supposed to create a diversion or create the impression that things were happening, that would have been him. None of us knows 100%, Mr. Wright, what happened on that day, April the 19th, but I think it's pretty likely, more likely than not, that you and Mr. Swafford were in this together. That you jeopardized your probation over \$10 worth of gasoline and thought you'd get away with it. You don't. So the Court's finding is, based on the preponderance of the evidence, Mr. Wright participated in a theft of gasoline as charged.

Tr. at 37-38.

Here, the trial court understood the standard by which the evidence was to be judged. The trial judge heard the evidence and witnessed the demeanor of the witnesses, including Wright. The trial court did not abuse its discretion in revoking Wright's probation based on a finding that the State showed, by a preponderance of the evidence, that Wright committed the crime of theft while on probation.⁴

Affirmed.

RILEY, J., and MAY, J., concur.

⁴ Wright also contends that, notwithstanding his failure to pay probation fees, the State failed to prove that his failure was recklessly, knowingly, or intentionally done. *See* IC 35-38-2-3(f). Because we determine that Wright's probation was properly revoked on the basis of his new offense, we need not conclude that the trial court erred in revoking Wright's probation because of his failure to pay probation fees. *See Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001) (holding that a trial court may revoke probation upon the violation of any single term of probation).